Dunn Chevrolet, Inc. d/b/a All Star Chevrolet *and* Emery Lamarr Rupley. Case 32-CA-3990

October 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On August 5, 1982, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed partial cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt her recommended Order, as modified herein.

The General Counsel excepted to the fact that although the Administrative Law Judge found that the Employer, acting through Dondero and Howard, threatened Rupley by saying he could not work for the Employer because of his past involvement in union activities, she did not specifically find that such conduct violated Section 8(a)(1) of the Act. We find that Respondent's threat violated Section 8(a)(1). Accordingly, the section of the Administrative Law Judge's Decision entitled "Conclusions of Law" is modified to include that finding. We shall make the appropriate modifications in the recommended Order and notice.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Dunn Chevrolet, Inc. d/b/a All Star Chevrolet, Livermore, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph accordingly:

"(b) Threatening employees by telling them they cannot work for Respondent because of past union activities."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to hire or discharge employees and fail to reinstate them because of their union membership and activities.

WE WILL NOT threaten to discharge or not hire employees because of their past union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL make whole Emery Lamarr Rupley for any losses he may have suffered as a result of our unlawful discrimination against him and WE WILL offer him immediate rein-

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

The General Counsel excepted to the Administrative Law Judge's finding that Respondent derived gross revenues in excess of $50,000 during the past year, instead of $500,000 as alleged in the complaint and admitted in the answer. This figure was incorrectly stated by the Administrative Law Judge and should read $500,000.

In the sixth paragraph of sec. III.C, of the Administrative Law Judge's Decision the name Anderson should read Armstrong.

[2] The Administrative Law Judge omitted Sec. 2(2) of the Act from her first Conclusion of Law although she had found above that Respondent is an employer within the meaning of that section.

statement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights.

WE WILL expunge from our files any reference to the refusal to hire or disciplinary discharge of Emery Lamarr Rupley on or about October 2, 1981, and WE WILL notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis or future personnel actions against him.

All our employees are free to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Our employees are also free to refrain from any or all such activities.

DUNN CHEVROLET, INC. D/B/A ALL STAR CHEVROLET

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard before me in Oakland, California, on May 25, 1982. On November 27, 1981,[1] the Regional Director for Region 32 issued a complaint and notice of hearing based upon a charge filed by Emery Lamarr Rupley, an individual, on October 13, 1981. The complaint alleges that Dunn Chevrolet, Inc. d/b/a All Star Chevrolet (herein called Respondent or the Company), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). Respondent, in its answer to the complaint, denies committing any violations of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Delaware corporation with an office and place of business in Livermore, California, and is engaged in the wholesale and retail sale of new and used automobiles and the retail sale of parts and automobile servicing. It further admits that during the past year, in the course and conduct of its business, it derived gross revenues in excess of $50,000 and that annually it purchased and received goods or services valued in excess of $5,000 from sources outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties have stipulated, and I find, that Automobile Salesmen's Union, Local 1095, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates two automobile dealerships, All Star Chevrolet and All Star Dodge,[2] which are across the street from one another in Livermore, California. Herbert Howard is the president of the Company, which employs his brother Andy as the sales manager for both automobile dealerships. The Company also employed Dale Peterson as general manager and, as here pertinent, two crew chiefs at All Star Chevrolet, John Dondero and Richard Rutledge.[3]

The Charging Party sought employment at All Star Chevrolet. It is the General Counsel's contention that Respondent failed and refused to hire Rupley, or discharged him, because the Company ascertained that in July 1979 Rupley filed an unfair labor practice charge against Tri-Valley Datsun, Inc., alleging discriminatory discharge and unlawful refusal to reinstate, resulting in the issuance of a complaint which was resolved through the entry into a settlement agreement. The settlement agreement provided, in part, for the payment to Rupley of $5,984 and the posting of a "Notice to Employees." Respondent asserts that Rupley was never an employee and that, at the time the decision was reached not to hire him, the Company did not have knowledge of any union or other concerted protected activity engaged in by Rupley.

B. *The Events of September 29 and 30*

On or about September 30, Rupley, who has been an automobile salesman for 10 years, applied for a job at All Star Chevrolet after inquiring the preceding day as to the availability of work from Bob Eudy, a salesman, who told him that the Company would be hiring and referred him to the general manager, Dale Peterson, and the owner, Herb Howard, as the individuals he should contact for a job interview. Rupley telephoned Peterson[4] who informed him that Respondent was hiring salesmen and he should come over, fill out an application, and "report to John Dondero because he needed someone on his crew.

Rupley did go to All Star Chevrolet and spoke to Dondero who gave Rupley his card indicating Dondero was the sales manager.[5] Dondero gave Rupley an appli-

[1] All dates herein refer to 1981 unless otherwise indicated.

[2] All Star Dodge was purchased by the Company in July 1981.

[3] The question of whether crew chiefs are supervisors is in dispute and will be resolved below.

[4] Peterson did not appear and testify. Neither party made any representations regarding his availability as a witness.

[5] Dondero did not appear and testify. It appears that counsel for the General Counsel was going to subpoena Dondero, so informed Respond-

Continued

cation for employment to fill out and then interviewed him for a salesman position. According to Rupley, Dondero then discussed how salesmen were paid and certain job benefits including the vacation and medical insurance plans. During the interview, Rupley told Dondero that he would "run into a problem" if Respondent checked with Tri-Valley Datsun "because we didn't get along that well and his statement was to me that we've all had problems at different dealerships and that wasn't the main thing that he was going to check anyway. It was more or less DMV [Department of Motor Vehicles] and credit type things." After the interview, Dondero told Rupley that he would have to review the application with Dick Rutledge, another manager, before a decision could be reached regarding his employment.[6] "But he said that it looked pretty good and he didn't think that it would be any problem and so that he would let me know later that day and for me to call him back about 2:30."

Rupley testified that, when he called back at 2:30, Dondero said he was at a meeting and asked Rupley to call again in 10 or 15 minutes. When Rupley did call back 10 or 15 minutes later, he was informed that Dondero had gone for the day; so he asked to speak to Rutledge. According to Rupley, Rutledge stated Respondent wanted to hire him and have him start the following day, Friday, rather than the following Monday when Rupley said he would prefer to start work. Rupley stated he would have to get approval from his then current employer, Firestone. Later that day, Rupley gained approval from his employer to leave since it was the beginning of the month and pay period, and so informed Rutledge. During the same telephone conversation, Rupley stated he needed a demonstration car because at the time he had to commute to Livermore from Modesto, California, and his wife needed the use of the only car his family owed. Rupley claims he was told to report to work for the evening shift at 2:30 p.m. on Friday, October 2.

Rutledge denies ever talking to Rupley on the telephone and hence denies that Rupley was hired. Respondent denies that Dondero or Rutledge hired or had authority to hire Rupley. According to Howard, Dondero was never a sales manager, rather both Rutledge and Dondero were "closers," or crew chiefs. Both Rutledge and Dondero had at least two sets of business cards, one identifying them as working in "sales and leasing" and the other identifying them as "sales manager." This latter card was assertedly used in conjunction with their jobs as closers. A closer was described as one of the better salesmen who, when one of the other salesmen cannot close a deal with a customer, attempts to finalize the negotiations, for which he is remunerated 5 percent of the "gross."[7] The closers also receive the same commission as other salesmen on all sales they initiate and close themselves.

C. *The Events of October 2*

According to Rupley, he reported to work at All Star Chevrolet at 2 p.m. When he arrived, he saw two men near the entrance and asked them if Dick Rutledge was there. One of the men introduced himself as Rutledge, so Rupley identified himself. Rutledge said, "Very good, welcome aboard," and then introduced him to the other man, Herbert Howard, who "also said that they were glad to have me with them and welcome aboard." Rutledge then took Rupley into his office, explained the pay and vacation plans, and gave him his work schedule for the month of October. Rutledge then assigned him an office after which Rupley went out on the showroom floor and to the used-car lot to familiarize himself with the dealership's stock. Subsequently, Rupley asked Rutledge what code they employed on the used cars since he was unfamiliar with that utilized by Respondent. Rutledge accompanied him to the used-car lot, and demonstrated on the back of one of his business cards[8] how to read the code. Rupley then returned to the showroom floor, recognized an acquaintance of 20 years who had been a coworker at Tri-Valley Datsun, Jim Armstrong.[9] Armstrong, who was working for Respondent as a salesman at All Star Dodge, greeted Rupley and asked what he was doing there. Rupley replied that he was working there.

At approximately 3:30 p.m., Rupley was asked by Dondero to accompany him to Herb Howard's office, which he did. Herb Howard was not in the office at this time. According to Rupley, "Mr. Dondero stated to me at that time . . . that he could no longer have me continue employment with them because of the union activity that I had been involved in." Rupley then inquired if Armstrong was the source of this information since he was on the showroom floor 15 minutes prior to this conversation, but Dondero represented that he ascertained the information from other sources also. The Charging Party explained that Armstrong and he shared many acquaintances, had worked together before, and Armstrong did not want him working there because "he did not want the competition." Dondero assertedly replied "that they have had too many problems in the past and because of my affiliation with it, they could not take a chance of hiring me or putting me to work at this time . . . so I asked him if Herb Howard knew about the situation. He then stated to me that he does. I then asked to speak to him . . ."

Rupley waited until Howard could meet with him. Rupley further testified:

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ent, and then could not locate him for service of the subpoena. Dondero left Respondent's employ subsequent to the events complained of herein. The record is silent regarding the details of Dondero's leaving Respondent's employ, or whether Respondent knew where he could be reached.

[6] Rutledge testified that he and Dondero were never consulted about new hires.

[7] The salesman usually is paid only a commission, not a salary. The commission was described as 30 percent of the "gross."

[8] The card designated Rutledge as sales manager.

[9] Armstrong did not appear and testify. Since Armstrong was not a supervisor and was apparently equally available to both parties to this proceeding, no adverse inference shall be taken due to the failure of either party to call him as a witness. *Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors Association of Washington)*, 242 NLRB 1157, 1160, fn. 10 (1979).

> Mr. Howard stated to me also that because of the union activities that they had found out about from apparently somewhere, I don't know for sure, but they [H. Howard] said because of the union activities that they could not hire me and they could not have me be employed there.
>
> And there again, they had too many problems before. Apparently it was something, I don't know what it was, the problem that they had, but they said at this time they could not take a chance on an employee that had some past problems on it. So I stated to him that, I did want the job, I was not involved in it, okay, and I did want to go to work for them and he stated to me then that he [Howard] would do some further checking on it and let me know, but he [Howard] didn't feel that there would be a great possibility. . . .
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> One of the things that he [Howard] mentioned earlier or asked me was how long I had lived in Modesto and . . . I said for 2-1/2 years and his statement was to me, well, that was a funny place to move to if you were a union organizer.

Rupley was not offered a job by Howard or any other representative of Respondent after this conversation.

Rutledge asserts his initial contact with Rupley was when Rupley walked into his office in early October and introduced himself as a new employee. In Dondero's absence, Rutledge "welcomed him aboard" and began explaining a salesman's job duties. Rutledge was responsible for preparing the monthly work schedule, and he then modified the existing schedule to include Rupley, made several copies of the new schedule, and gave one to Rupley. When Dondero reported to work at 3 p.m.,[10] Rutledge informed him that Rupley "was there," to which Dondero replied, "Fine." There were no discussions regarding office assignment; salesmen are not assigned to individual offices at All Star Chevrolet, according to Rutledge. However, Rutledge did acknowledge that he generally used the same office at the Company. Further, Rutledge did admit explaining to Rupley the retail price code employed by the Company on used cars, which is considered confidential information. Rutledge also asserts that neither he nor Dondero was a supervisor, that they could not hire or fire employees.[11] The testimony of Rutledge, where it is disparate from Rupley's statements or is not an admission, is found not credible based on demeanor, the fact that much of the testimony was adduced by the use of "leading questions under direct examination,"[12] many of his statements were conclusionary in nature,[13] the testimony was presented in a fashion that demonstrated it was tailored to support a litigation theory rather than an attempt to testify clearly,[14] and inherent inconsistencies.

Herbert Howard generally claimed that Dondero told him on the telephone that Anderson heard the Company was considering hiring Rupley and reported that Anderson had known Rupley since childhood and recommended that the Company not hire him because Rupley "had caused heat where he had worked." Howard did not try to talk to Armstrong to find out what "the heat was . . ."[15] Therefore, H. Howard told Dondero he had decided not to hire Rupley at that moment, to check him out through his previous employers and find out what the problem was. In response to Rupley's request to discuss the decision with him Howard told Rupley that Armstrong said negative things about him, that he had caused trouble on the showroom floor, but he doubted that he went into detail. Although he testified he never saw Rupley's application, he further stated to Rupley that if he received good references from his previous employer he would consider hiring him. Rupley mentioned he had some problems at Tri-Valley Datsun, so Howard said if that was the only problem, it would not bother him too much; he would check the other references on the application. It was after talking to Dondero that he decided not to hire Rupley.[16]

Later in the day, H. Howard talked to the owner of Tri-Valley Datsun, Phil Sterns.[17] According to H. Howard:

> I asked him if he knew the gentleman and he says, I do. I says can you tell me anything about him and he says I would rather not and I says well, can you tell me if he's a good employee, bad employee, good salesmen, bad salesmen and he says I would not let him in my front door, let alone sell a car for me. And I says what kind of trouble did you have and he says I won't say. That's all I'll say and that's all he said to me.

Contrary to his representation to Rupley and his initial statement to Dondero to not hire Rupley until he checked his references, Howard and/or Dondero never checked any other references listed by Rupley on the

[10] Although Rutledge testified that normally Dondero's shift would have started at 2 p.m. the day Rupley came in to work, Dondero did not come to work until after 3 p.m. This absence was unexplained.

[11] H. Howard described Rutledge and Dondero as "mere closers," and asserts that only the Howard brothers and Peterson hired and fired automobile salesmen.

[12] Testimony adduced by "leading questions under direct examination" is entitled to minimal weight. *H. C. Thompson, Inc.*, 230 NLRB 808, 809, fn. 2 (1977).

[13] *Local Union No. 673, International Union of Operating Engineers, AFL-CIO (Westinghouse Electric Corporation)*, 229 NLRB 726 (1977); and *Rosa M. Alexander d/b/a A & B Janitorial Service*, 253 NLRB 508 (1980).

[14] For example, Rutledge stated he would only glance at the applications presented by prospective employees, he would not review them, but he admitted he did interview them for about 15 minutes to assess the individual's ability to do the work and to determine if they would fit into the organization; and, based on this assessment, he would make recommendations regarding the desirability of employing such applicants and, at times, his negative recommendations on applicants were the final decision, for the Howards "have some faith in what I think." Cf. *Apollo Tire Company, Inc.*, 236 NLRB 1627 (1979); and *Carruthers Ready Mix, Inc.*, 262 NLRB 739 (1982).

[15] Subsequently, H. Howard altered his testimony asserting that Dondero stated that Armstrong told him that Rupley caused "a tremendous amount of trouble in any store he's worked at . . . he's a problem on the floor. He has a tendency to get the salesmen down and questions the commissions and just general [sic] causes problems in an organization . . . ."

[16] On examination by the General Counsel which was conducted with some difficulty, due to lack of responsiveness, H. Howard admitted that he told a Board representative that he decided not to hire Rupley after talking to Sterns, the owner of Tri-Valley Datsun.

[17] Sterns did not appear and testify at this proceeding.

"not seen" application although Howard did mention he knew one or two of the owners listed thereon.

Subsequently H. Howard talked to Armstrong at or about 5 or 6 p.m. the same day, which was when "he told me, he says that Phil Sterns had had a union problem with him and he [Armstrong] went into a long dissertation . . . "[18] wherein Armstrong probably stated that Rupley went to the National Labor Relations Board because he had been fired, that a settlement resulted, and that it "was a hassle."

Herbert Howard is not a credible witness based on demeanor, the inconsistencies in his testimony only a few of which have been noted above; at times he was evasive, not candid in his vague and conflicting responses, which were self-serving, and much of his testimony was adduced by leading questions.[19] Conversely, Rupley testified with clarity and sincerity, exhibiting a good memory for facts. Thus, his testimony is credited, and it is found that both Dondero and H. Howard told him the decision not to employ him or retain him as an employee was based on his union activities while he was employed at Tri-Valley Datsun.

Analysis and Conclusions

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." In *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and Board cases decided thereafter, analysis of unlawful refusal to hire or unlawful discharge proceedings will follow the test applied by the Supreme Court in *Mt. Healthy School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). As explained in the *Wright Line* case, *supra*, 251 NLRB at 1089, the Board will:

> . . . require that the General Counsel make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected conduct was a "motivating factor" in the employer's decision [to discipline the employee]. Once this is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Based on the credited testimony, as found above, Respondent, through both Herbert Howard and Dondero, admitted that the action was taken for a proscribed reason.

However, even assuming that this direct evidence of discriminatory motive were absent, the available evidence also supports the inference that the reasons for Respondent's actions were based on a discriminatory motive. Respondent contends that it never hired Rupley because Armstrong advised against it without giving detailed reasons for his advice. Therefore Respondent contends it had no knowledge of Rupley's concerted protected activities; hence, it could not have discriminated against him because he had engaged in such actions.

Initially, it is found that Rupley was hired by Respondent on or about October 2. Rupley quit his job with Firestone on short notice. The evidence of record shows Rupley to have reported prior to the start of the shift, was then included in the work schedule for the month of October, and acquainted with some of Respondent's operating procedures, including being made privy to confidential information. These uncontroverted facts belie any claims of Respondent that Rupley misrepresented to Rutledge that he had been hired. This conclusion is buttressed by Dondero's response according to Rutledge, when Dondero was informed of Rupley's presence. Dondero according to Rutledge, replied, "Fine." There was no question raised by either Dondero or Rutledge regarding the propriety of or basis for Rupley's presence as a new employee on or about October 2. That Rutledge or any other representative of Respondent did not have Rupley complete necessary documents such as social security forms and insurance is undisputed;[20] however, there was no showing that Respondent routinely or otherwise had new employees complete the necessary documents within the first hour of their employ. Respondent's practice in this regard is information solely within its purview and the failure to provide it warrants the drawing of an adverse inference.[21] Alternatively, Respondent has failed to substantiate its claim that Rupley's failure to complete certain documents proves that he was not hired by Dondero.

Respondent's claim that Dondero could not have hired Rupley because Dondero did not have the requisite authority is similarly found to be without merit. Section 2(11) of the Act defines a supervisor as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory definition of a supervisor is framed in the disjunctive; hence, to be found a supervisor, an individual employee need possess only one of the enumerated indicia of supervisory authority if such authority is "present in a form which requires the exercise of inde-

[18] At another point in his testimony, H. Howard stated that only after the charge was filed did he "start checking around" and found out his "problem" involved union activities.

[19] See cases cited above with regard to Rutledge's credibility.

[20] Respondent also asserted initially that Rupley needed to acquire a sales license from the State but it later admitted that since Rupley had a valid license he did not need to obtain another.

[21] *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) [Gyrodyne Co.]* v. *N.L.R.B.*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *Northern Packing Co.* v. *Page*, 274 U.S. 65, 74 (1927). H. Howard merely testified that, after an individual is hired, he is taken to the business manager to complete the necessary forms. Exactly when this is done was not detailed and the business manager, Mary Hallor, who was described as a manager by Respondent, did not appear and testify. Accordingly, the failure to call Hallor to testify on this issue also warrants the taking of an adverse inference under the missing witness rule.

pendent judgment." *N.L.R.B.* v. *Local Union No. 252, Lithographers-Photoengravers International Union, AFL-CIO* [*Sayers Printing Co.*], 453 F.2d 810, 814 (8th Cir. 1971). The record clearly establishes that "crew chiefs" effectively recommend if a job applicant is hired or not. According to Rutledge, in every instance that he recommended an applicant be employed, that applicant was hired and he has at times, independently and without consultation, exercised the final decision to not employ an applicant. This conclusion is buttressed by the business cards used by the crew chiefs whereon Dondero and Rutledge are referred to as "sales managers." That such cards are used as a sales ploy does not necessarily require a different finding, for the ploy, if such is the case, does not define the duties of the individual named thereon nor does their use require a finding of disingenuousness. However, if such disingenuousness were found, then only credibility is further impaired and the shape of the "closer's" duties is not clarified thereby. Furthermore, Respondent, in a position statement that is unrelated to settlement negotiations, admitted that Dondero had been a sales manager but asserted that in August, preceding the events complained of herein, there was a change in Dondero's job classification to crew chief. There was no evidence of record detailing any changes in Dondero's duties between July and October. Accordingly, based on the title used by Dondero when he interviewed Rupley, Rutledge's admitted independent exercise of judgment in the hiring of employees, and the position statement, it is concluded that Dondero did have authority to hire Rupley;[22] and that Rupley was, in fact, hired.

Alternatively even if it were found that Rupley had not been hired by Dondero, he was a prospective employee. Prospective employees are "employees" within the meaning of Section 2(3) of the Act and hence are protected by the Act's prohibition against discrimination in regard to hire. *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177 (1941); *Young Hinkle Corporation*, 244 NLRB 264 (1979); *Wyman-Gordon Company*, 252 NLRB 1206 (1980); and *Consolidated Freightways Corporation of Delaware*, 242 NLRB 770 (1979).

As noted above, Rupley's credited testimony established that both Herbert Howard and Dondero knew of his union activity at Tri-Valley Datsun and they mentioned this activity as the basis for their decision not to retain him as an employee. Even absent this direct evidence of Respondent's knowledge, there is strong circumstantial evidence that Respondent knew of Rupley's activity since Armstrong, whose comments were the admitted genesis of Respondent's decision, knew of Rupley's actions at Tri-Valley Datsun, and these actions were disclosed to be the basis for Armstrong's recommendation. It tends to strain the bounds of credulity to believe that both Dondero and Herbert Howard would have acted with such alacrity without having any knowledge regarding the basis for Armstrong's statements. H. Howard's admitted directive to Dondero to check Rupley's references further prior to committing the Company to hire him indicates that the claimed generalized basis for Armstrong's recommendation was considered to be inadequate to warrant a decision to fire or not hire him.

Concomitantly, if it is again assumed that Rupley's testimony ascribing union activity as the basis for the Company's action is not credited, the basis or motive for Respondent's discharge of Rupley is determined by inferences similar to those establishing the Company's knowledge of Rupley's union activities. As noted above, the General Counsel has made a *prima facie* showing that the employee's protected activity was a motivating factor in the Employer's decision. This finding is not only based upon the credited testimony of Rupley but by the inferences of unlawful intent drawn from the circumstances surrounding the decision. Respondent has failed to establish that it would have taken the same action in the absence of the protected concerted activity. Respondent's inconsistent actions and statements, some of which are detailed above, support this conclusion. Further examples include H. Howard admittedly telling Rupley that he would call references other than Tri-Valley Datsun, yet admittedly only calling Tri-Valley Datsun to determine if Rupley was a good employee. H. Howard acknowledged that Rupley indicated Tri-Valley Datsun would not give him a good reference and hence he indicated he would check other references. When H. Howard admittedly ascertained the details of the Tri-Valley Datsun incident, he did nothing,[23] even though he promised Rupley he would consult with other references and, if the other references were favorbale, Howard would contact Rupley the following day. The testimony does not detail any other specific incidents or actions ascribed by Armstrong or anyone else to Rupley which would indicate that Respondent would have taken the same action absent the protected conduct.[24] Therefore, it is found that Rupley was discharged, and such action was for a discriminatory reason in violation of Section 8(a)(3) of the Act.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, Dunn Chevrolet, Inc. d/b/a All Star Chevrolet, as set forth in sections III and IV above, occurring in connection with Respondent's

[22] Respondent's further argument that Dondero could not hire Rupley without approval from either Peterson or one of the Howard brothers is also without merit, even if credited, for neither Andy Howard nor Peterson was shown to have not participated in the decision to hire Rupley. Further neither Andy Howard nor Peterson appeared and testified even though they were admitted supervisors, warranting the taking of an adverse inference. See, for example, *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977). Dondero's absence as a witness will not be similarly construed since he has left Respondent's employ and appears to have been equally accessible to both parties.

[23] As previously indicated, H. Howard claims that Armstrong gave him the details of the Tri-Valley Datsun incident around 5 or 6 p.m. on October 2.

[24] H. Howard's vague references to Rupley being a "troublemaker" or causing "heat" on the showroom floor, standing alone, are insufficient to show lawful motive. In fact, the use of such self-serving untrue generalities are indications of unlawful motive. See *Golden Day Schools, Inc.* v. *N.L.R.B.*, 644 F.2d 834 at 838 (9th Cir. 1981). The use of the term "troublemaker" also infers that the Employer knew that the employee was engaging in union or concerted activity. See *C-E Cast Equipment-Furnace Systems, a Division of Combustion Engineering, Inc.*, 260 NLRB 520 (1982).

operations, described in section I, above, have a substantial and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

CONCLUSIONS OF LAW

1. Dunn Chevrolet, Inc. d/b/a All Star Chevrolet is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Automobile Salesmen's Union, Local 1095, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(3) and (1) of the Act by its discriminatory refusal to hire and/or its discharge of Emery Lamarr Rupley.

THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act. Accordingly, Respondent shall be ordered to immediately reinstate Emery Lamarr Rupley to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority and other rights and privileges, and to make him whole for any loss of earnings and compensation he may have suffered because of this illegal discrimination against him in his employment as herein found. Backpay shall be computed with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest per annum computed in the manner prescribed by the Board in *Florida Steel Corporation*, 231 NLRB 651 (1977).[25]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[26]

The Respondent, Dunn Chevrolet, Inc. d/b/a All Star Chevrolet, Livermore, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, refusing, and failing to hire employee applicants, or otherwise disciplining employees and failing to reinstate them for the purpose of discouraging employees from engaging in union or other protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Emery Lamarr Rupley immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and make him whole for loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from Respondent's files any and all references to the discriminatory refusal to hire or termination of employment of Emery Lamarr Rupley on or about October 2, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records and reports and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(d) Post at its Livermore, California, facilities copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[25] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."